Mastronardi Mason Materials Co., and its successor and alter ego Queens Ready Mix, Inc. *and* Local 282, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–20589 29–CA–21060

December 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 17, 1999, Administrative Law Judge Steven Davis issued the attached decision.* The Respondents filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondents filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge that Respondent Queens Ready Mix (QRM) was an alter ego of Respondent Mastronardi Mason Materials Co. Assuming arguendo that QRM was not an alter ego, we would agree with the judge that it was a successor employer.[3]

We adopt the judge's finding that Respondent QRM violated Section 8(a)(3) and (1) by conditioning the reemployment of employees McCabe and Iadanza on their withdrawal from union membership and acceptance of the nonunion terms and conditions of employment unilaterally imposed by QRM, and by refusing to rehire them because they refused to renounce their Union affiliation. It is unlawful for an employer to condition an employee's future employment on the employee's withdrawal from union membership. See *A-1 Schmidlin Plumbing Co.*, 284 NLRB 1506 (1987), enfd. mem. 865 F.2d 1268 (6th Cir. 1989). Accordingly, there is no merit to the Respondents' contention, in their exceptions, that employees Iadanza and McCabe were not unlawfully discharged.

The judge found that QRM violated Section 8(a)(2) and (1) by recognizing Service Employees International Union Local 355. In doing so, he rejected the Respondent's contention that it had an objective basis for believing that the employees had rejected the Charging Party incumbent Union and had selected Local 355. The judge applied the good faith doubt (uncertainty) standard for an employer's withdrawal of recognition from an incumbent union, here the Charging Party. In *Levitz*, 333 NLRB No. 105 (2001), which issued after the judge's decision in this case, the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny, insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." Id., slip op. at 1. However, the Board also held that its analysis and conclusions in that case would only be applied prospectively; "all pending cases involving withdrawals of recognition [will be decided] under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court" in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). Here, we find that the Respondents have not established—sufficient to support their refusal to recognize the Union—that they had a good-faith uncertainty, based on objective evidence, that the Union continued to have majority support in the bargaining unit.[4]

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* At II,F,1, par. 16, the judge stated that the subsequent Association agreement ran from "1996 to 1996;" the correct dates are "1996 to 1999."

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondents' exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

There are no exceptions to the judge's finding that the Charging Party was the exclusive representative for purposes of collective bargaining, pursuant to Sec. 9(a), of Respondent Mastronardi's employees, and that the parties' relationship was not governed by Sec. 8(f).

The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001).

[3] In adopting the judge's finding that QRM is an alter ego of Mastronardi, Chairman Hurtgen relies on the judge's finding that the establishment of QRM was motivated by antiunion animus. In Chairman Hurtgen's view, proof of antiunion animus is necessary in order to establish alter ego status.

[4] Chairman Hurtgen notes that he dissented from the Board's decision in *Levitz* rejecting the "good faith doubt" standard for an employer's withdrawal of recognition from a union. However, he agrees with his colleagues that the pre-*Levitz* law was correctly applied herein.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Mastronardi Mason Materials, Inc. and its successor and alter ego Queens Ready Mix, Inc., Jamaica, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a):

"(a) Recognize and, on request, bargain with Local 282 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees classified as chauffeurs employed by members of the Association of New York City Concrete Producers, Inc., hereinafter called the Association, and of the employers who have authorized the Association to bargain on their behalf, including Respondent Mastronardi.

1. Substitute the following for paragraph 2(i):

"(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 18, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with layoff if they do not abandon their membership in Local 282.

WE WILL NOT condition the re-employment of our employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of our last offer to the Union.

WE WILL NOT refuse to rehire from seasonal layoff our employees Daniel McCabe and Ronald Iadanza because of their membership in Local 282.

WE WILL NOT withdraw recognition from Local 282 and refuse to bargain with it by prematurely declaring impasse in negotiations with the Union, by failing to continue in effect all the terms and conditions of the collective-bargaining agreement between Mastronardi Mason Materials Co. and Local 282 which expired in June 1996, or by unilaterally changing terms and conditions of employment set forth in the expired collective-bargaining agreement between Mastronardi Mason Materials Co. and the Union without a valid impasse having been reached.

WE WILL NOT recognize Local 355, Service Employees International Union or execute a collective-bargaining agreement with it which provides for the deduction of dues and other fees at a time when we are obligated to recognize and bargain with Local 282.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and on request, bargain with Local 282 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees classified as chauffeurs employed by members of the Association of New York City Concrete Producers, Inc., hereinafter called the Association, and of the employers who have authorized the Association to bargain on their behalf, including Respondent Mastronardi.

WE WILL reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement between Mastronardi Mason Materials Co. and the Union, which expired in June 1996.

WE WILL make the contractually required payments to the benefit funds that were not made, and make whole the unit employees, including Ronald Iadanza and Daniel McCabe, for any losses they may have suffered as a result of the failure to make such payments, and for any losses they may have suffered as a result of our failure to adhere to the terms and conditions of employment in the collective-bargaining agreement between Mastronardi Mason Materials Co. and the Union which expired in June 1996.

WE WILL within 14 days from the date of this Order, offer Ronald Iadanza and Daniel McCabe full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Iadanza and Daniel McCabe whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL within 14 days from the date of this Order, remove for our files any reference to the unlawful refusals to rehire, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to rehire will not be used against them in any way.

WE WILL withdraw and withhold recognition from Local 355, SEIU, AFL–CIO, as the representative of our employees unless Local 355 has been certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

WE WILL reimburse past and present employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed between Queens Ready Mix, Inc. and Local 355.

MASTRONARDI MASON MATERIALS CO, AND ITS ALTER EGO QUEENS READY MIX, INC.

Joanna Piepgrass, Esq., Brooklyn, NY, for the General Counsel.

Susan Panepento, Esq. (Cohen, Weissand Simon, Esqs.), New York, NY, for the Union.

Luigi De Maio, Esq. (Jackson & Nash, LLP), New York, NY, for the Respondents.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge in Case. 29–CA–20589 filed on January 2, 1997, by Local 282, International Brotherhood of Teamsters, AFL–CIO (Union), and based upon a charge in Case. 29–CA–21060 filed on May 30, 1997, by the Union, a consolidated complaint was issued against Mastronardi Mason Materials Co., (Mastronardi) and its successor and alter ego Queens Ready-Mix, Inc. (QRM) on March 30, 1998.

The complaint, as amended at the hearing, alleges essentially that Mastronardi established QRM as a disguised continuation of Mastronardi, that QRM is the alter ego and successor of Mastronardi, and that they are a single employer. The complaint further alleges that following the expiration of a collective-bargaining agreement between Mastronardi and the Union in June 1996, (a) Mastronardi threatened employees with layoff, (b) QRM conditioned the re-employment of its employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of QRM's last offer to the Union, and (c) QRM refused to rehire from its seasonal layoff employees Ronald Iadanza and Daniel McCabe.

The complaint also alleges that the Union represents the employees in the unit employed by QRM and its predecessor Mastronardi and that (a) Mastronardi prematurely declared impasse in negotiations with the Union (b) QRM unilaterally changed terms and conditions of employment set forth in the expired collective-bargaining agreement without a valid impasse having been reached, and even if an impasse had been reached the changes made were inconsistent with the final offer made at the time of impasse.

Finally, the complaint alleges that in late 1997 or 1998, Mastronardi and/or QRM unlawfully recognized Local 355, Service Employees International Union (Local 355), and unlawfully executed a collective-bargaining agreement with it, which provides for the deduction of dues and other fees.

Respondents denied the material allegations of the complaint and on December 16, 21, and 23, 1998, and January 20 and March 19, 1999, a hearing was held before me in Brooklyn, New York.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Mastronardi, a New York corporation having its principal office and place of business at 149-01 95th Avenue,

Jamaica, New York, had been engaged, until January, 1997, in the production and sale of concrete.

Respondent QRM, a New York corporation having its principal office and place of business at 149-01 95th Avenue, Jamaica, New York, has been engaged, beginning in January, 1997, in the production and sale of concrete.

Annually, Mastronardi and QRM purchase and receive products, goods, and materials valued in excess of $50,000 directly from suppliers located outside New York State. Respondents admit and I find that they are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondents also admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Mastronardi's Workforce

Mastronardi was owned and operated by brothers Gerardo (Jerry) and Vincente Mastronardi. Gerardo was the president and Vincente was the vice president and treasurer.

The company supplied concrete to customers, which ranged in size from large construction sites to small homeowner type sidewalk installations.

Gerardo and Vincente were working bosses. They took orders from customers, loaded trucks and sold materials, tools and equipment at the store located on the premises. Employee Daniel McCabe reported to both brothers, both of whom signed his paycheck. The facility occupied a one-block area, which contained a yard in which sand and stone were stored, two silos holding cement and powder, an office, and a store for the sale of mason equipment and tools.

Gerardo had two sons—Antonio, a driver who also worked in the yard, and Daniel, a driver worked for Mastronardi. Vincente's daughter Christina and son Antonio worked in the office. Vincente's son, Mario worked in the yard.

A nephew of the Mastronardis', Franco, worked as a driver. The other drivers were McCabe and Ronald Iadanza. Herbert was employed as a yardman.

B. The Collective-Bargaining Relationship

In 1977, Mastronardi signed its first collective-bargaining agreement with the Union. That was a building materials agreement, and in 1983 it signed the New York City Ready Mix Concrete, Sand, Gravel and Bulk Cement Agreement.

Mastronardi also signed the 1990–1993 New York City Ready-Mix Agreement in which it recognized the Union as the exclusive collective-bargaining agent for its drivers. The agreement was between the Union and Association of New York City Concrete Producers, Inc. (Association) acting for and on behalf of itself, its members, and those individual employers who, by execution of the agreement, authorized the Association to act on their behalf.

Upon the expiration of that agreement on June 30, 1993, Mastronardi executed a memorandum of agreement in August 1993, pursuant to which it agreed to a collective-bargaining agreement between the Association and the Union effective from July 1, 1993 through June 30, 1996.

C. The Alleged Threats and Refusal to Hire Employees

Iadanza and McCabe were the only employees represented by the Union at Mastronardi prior to the expiration of the Association contract in June 1996. Mastronardi employed them as drivers for 17 years and 14 years, respectively. They generally worked 10 months per year and had a seasonal layoff during January and February.

McCabe gave uncontradicted testimony that in July 1996, after the collective-bargaining agreement expired, he was told by Gerardo and Vincente that they were not going to "re-sign" with the Union and that they were "going to go non-union" because the Union contract was too expensive and they could not "compete in the marketplace." They told McCabe that if he wanted to continue to work for them, he could work under a nonunion "contract."

Iadanza stated that following the ratification of the industry contract in early August 1996, he reported to work. When he informed Vincente that the contract had been ratified, Vincente informed him that he would not agree to the contract, his own attorney was negotiating a contract with the Union, and that he did not want the Union to be involved with the company.

In November 1996, Gerardo told McCabe that the company would not sign a contract with the Union and would go nonunion. McCabe replied that he could not accept the fact that they would leave the Union and he would not have a future with the company. The same conversation was repeated in December.

Notwithstanding that the contract expired in June 1996, all the terms of the expired contract including the deduction of dues from the pay of Iadanza and McCabe, and fund contributions made on their behalf, were adhered to by Mastronardi until January 1997, when the company ceased doing business for the season.

McCabe's last day of work was January 6, 1997. In or about February, he visited the office to see when he could return to work. Gerardo told him that if he wanted to continue to work he could work nonunion, and if he wanted to remain with the Union he would have to find work elsewhere. McCabe refused, telling Gerardo that he had too much time invested in the Union and did not want to give up his pension and retirement money.

Iadanza stated that on his last day of work, January 10, 1997, he was told by Gerardo to have the customer to whom he was making a delivery write the check to QRM, and not Mastronardi. When asked why, Gerardo told him that QRM was the name of the new company. At about the same time, Iadanza was in the company office when he was given the phone by Gerardo who asked him to speak to his attorney, Luigi De Maio. Iadanza stated that De Maio asked him if he knew the company was "going non-union" and told him that the Mastronardis liked him and McCabe very much and want them to stay. De Maio asked him to consider remaining employed without the Union. Iadanza refused to speak with De Maio further. Iadanza further stated that in early January 1997, Antonio Mastronardi, the president of QRM, told him that the company was going "nonunion," and he wanted Iadanza to consider leaving without trouble or problems and he would get him a job with City Transit Mix, a Union company. Iadanza rejected the offer.

On March 10, Iadanza and McCabe reported to the office in an effort to return to work. McCabe stated that he was told by

Gerardo that the company no longer "belonged" to the Union, and that they had "reorganized or reformed" as a new company named Queens Ready-Mix, which was nonunion. McCabe replied that he could not return to work as a nonunion employee. Vincente told Iadanza that there was much work and they could start today as nonunion employees since the company did not want to have "anything to do with the Union anymore." Iadanza said that he and McCabe would not work unless they were protected by a Union contract.

Iadanza refused to accept Gerardo's offer to return to work since he believed that the company was supposed to be negotiating a new contract with the Union.

By letter dated April 29, 1997 from Respondents' attorney De Maio to Iadanza and McCabe, they were advised that Mastronardi Mason Materials "ceased operations this winter as a result of the retirement of one of its principals." The letter further advised:

> Prior to the cessation of operations, Mastronardi Mason Materials attempted to negotiate a collective-bargaining agreement with Local 282. It was unable to do so, and in the Fall of 1996, the parties reached impasse.
>
> Jerry Mastronardi has formed Queens Ready-Mix to manufacture and deliver ready mix concrete. While Queens Ready-Mix is by no means a successor to Mastronardi Mason Materials, in order to avoid any prejudice to you, in March 1997, Queens offered employment to you on the same terms of Mastronardi's last contract offer to Local 282. That offer of employment is still open and will be open for a period of 10 days from the date of this letter.
>
> If you are interested in accepting employment by Queens Ready-Mix please communicate with this office directly.

Both Iadanza and McCabe stated that they did not reply to the letter. However, De Maio testified that Iadanza phoned him and told him that he wanted to continue to be a member of the Union and accrue pension, welfare, and annuity contributions. Iadanza refused to work except under a Union contract. De Maio denied telling him or McCabe that their resignation from the Union was a prerequisite to their return to work.

D. Queens Ready-Mix

Gerardo Mastronardi is the owner and secretary treasurer of QRM, and Antonio, Gerardo's son, is its president. Antonio Mastronardi, the president of QRM, testified that Mastronardi closed its operations in mid to late January 1997, and that QRM began operating at that time at the same location. Antonio stated that he drives a truck and also has other responsibilities. Gerardo also loads trucks. Daniel Mastronardi also drives trucks. In April 1997, Herbert, the yardman, was employed for 1 or 2 days, but not as a steady employee. At the time of the hearing he was no longer employed. Employees report to Antonio and Gerardo.

McCabe testified that when he returned to the facility in March 1997, he saw no difference in the office or store at Respondents' premises. The name of the company on the building was changed from Mastronardi to QRM by means of a sticker. The 9 or 10 trucks owned by Mastronardi which had grey barrels and red cabs were painted different colors, and the names on the cabs were changed from Mastronardi to QRM. The license plate numbers and the numbers assigned to each truck which was painted on the trucks all remained the same. McCabe saw no new equipment in the yard.

There is no current contract between QRM and the Union. QRM has not deducted dues in behalf of Local 282 from the wages of its employees and remitted them to the Union. QRM has not made any welfare or health fund contributions to the Union.

E. Continuity of Operations

McCabe testified that during his employment by Mastronardi he made deliveries of concrete to Cosmo Construction, Ferran, Larow Construction, Pace Construction, and S & V Construction. Iadanza testified that he delivered to Amati Construction, LaRocca Construction, Ferran, and J & A Construction.

In 1998, McCabe observed QRM trucks making deliveries to Cosmo, Larow, Pace and S & V Construction. Invoices in evidence show that Mastronardi and QRM made deliveries to Cosmo and Pace.

McCabe testified that suppliers of materials to Mastronardi included V & M, which delivered sand, gravel, and stone, and Norval, and Roland Johnson, which supplied cement powder. Iadanza stated that cement in bags were delivered by Lone Star and ATI, expansion joints from Nine Brothers, and bricks from Glen Gary. McCabe testified that following the start of QRM he saw Roland Johnson making deliveries to QRM. Similarly, Iadanza testified that the same companies made deliveries to Mastronardi and QRM, specifically, sand delivered by V & M, and bulk cement by ATI and Roland Johnson.

Invoices in evidence establish that Mastronardi and QRM delivered concrete and supplies to B.F. Co. (Barry Fishelberg Co.), Five Boro Construction Corp., Sal Narracci Construction, Pace Foundation Company, Roman Masonry Corp., R & F Development Corp., Recine Materials, and Three C's Ready Mix.

Further, certain deliveries made to A. Frezza Contracting, Narracci, Navarro, Oak Ridge Building Corp., Recine, Roda Equities and Three C's in February 1997, when Mastronardi was ostensibly out of business and QRM was operating, were recorded on Mastronardi invoices.

Invoices from suppliers establish that Mastronardi and QRM purchased cement from S. Dobkovsky Trucking, Inc., Essroc and Norval, Inc. Both companies bought limestone from Elliot Stone, Inc., fibremesh from Fibremesh Division, Synthetic Industries, sand and stone from Verrelli Trucking Co., Inc., color pigment from A & B Trading Corp., and other materials from Glen Gary Corp., Island Block Manufacturing, Lafarge Corp., Parcor Bagging, Inc.and Tilcon. Truck parts were purchased by Mastronardi and QRM from Jamaica Mack, Inc., and vehicle repair services were supplied to both by Queens County Tire Corp.

Although actual checks paid to suppliers by Mastronardi and QRM were not offered in evidence, it appears that payments to suppliers on account of purchases made by QRM were, for a number of months past January 1997, paid by Mastronardi

checks, or at least those checks from the same account as Mastronardi had used prior to January 1997.

Thus, checks for Mastronardi purchases prior to January 1997 bore apparently consecutive 5 digit check numbers. Checks received in evidence, which were used to pay for QRM purchases from January 1997 to May 1997, bore sequential 5 digit numbers. Beginning in June 1997, checks bearing 4 digit check numbers were used to pay for QRM purchases. Examples of such purchases are evident in purchases made from Grace Construction Products, Glen Gary, Lonestar Industries, Inc., Hygrade, Caulktite, Metro Ready Mix, Inc., Nextel, and Edison.[5]

A fair inference may thus be drawn that Mastronardi Mason Materials' 5 digit checks were used to pay for QRM purchases through May 1997. Thereafter, QRM paid for its purchases with its own 4 digit numbered checks.

Antonio Mastronardi, the president of QRM, testified that in 1996, when employed by Mastronardi, he made deliveries to Cosmo occasionally, Ferran only once or two times, J & A rarely, and did not make deliveries at all to Amai, Larocca, Gem, or S & V.

QRM used the same telephone number as Mastronardi through at least October 1997.

F. The Collective-Bargaining Negotiations

1. The General Counsel's Evidence

As set forth above, the Association agreement expired in June 1996.

Prior to that expiration, on March 29, Gerardo Mastronardi sent a letter to the Association, which stated that Mastronardi withdrew from the Association and would "no longer be taking part in any Association meetings. We will be negotiating our own contract with Local 282…." By letter of the same date Mastronardi notified the Union that it resigned from the Union effective immediately.

Negotiations for the Association agreement encompassed the period April through July 1996. Both Respondents, attorney De Maio, and Union International Trustee Gary LaBarbera agreed to delay negotiating a contract for Mastronardi until agreement was reached on the Association contract.

LaBarbera stated that he had brief discussions lasting only a few moments with De Maio in March 1996, concerning Mastronardi. In those discussions, De Maio expressed his view of what he believed the concrete industry should look like, including for example his belief that a lower wage rate should apply to deliveries of cement to small jobs. LaBarbera "dismissed" his comments as he believed his concept was a "joke," essentially because the suggestions were not specific, and were simply "philosophical views" of De Maio's concept of the ready mix industry.

On or about July 30, LaBarbera met De Maio briefly, and gave him a copy of the 1996 Union proposals, which were presented to the Association. During the summer, they did not otherwise meet, but they spoke about the Association negotiations and the impact of those negotiations upon Long Island employers.

In August, the Association agreement was ratified, and LaBarbera and De Maio agreed to meet in October. A meeting was arranged for and held on October 29.

LaBarbera stated that at the October 29 meeting, at which Thomas Gesualdi a Union representative was present, De Maio discussed 3 employers who he represented: Mastronardi, Atlas, and Greco. Thomas, an Atlas representative, was present for the first part of the meeting at which they discussed Atlas.

LaBarbera stated that he gave De Maio a copy of the 1996–1999 memorandum of agreement, told him that those were the terms and conditions the Union was seeking, and asked if he would accept them. LaBarbera also gave him a copy of the Union's proposals, which were made to the Association in that negotiation. Certain of those proposals were those that the Union was unable to obtain in negotiations with the Association, which were more favorable to the Union than the Association contract. Other proposals included those, which the Association and Union agreed would not be included in the new contract. LaBarbera noted that he would have accepted as the Mastronardi contract the Association contract or more favorable terms to the Union. However, his purpose at this point in the first negotiation session was to bargain a contract and begin the process in good faith.

LaBarbera testified that De Maio said that he needed a contract having union and nonunion provisions inasmuch as most of Mastronardi's work was for "home owner or private" jobs. De Maio told LaBarbera that the types of work performed by the 3 employers differed from that done by the Association employers. He claimed that they were "special employers" for whom the contract should provide a nonunion wage rate when deliveries were made to a homeowner, and that union wages should be paid when deliveries were made to a union site. According to LaBarbera, De Maio made no proposals concerning dollar amounts for wages, pension, health, or holidays.

LaBarbera stated that De Maio's position was that the bulk of his clients' work was small contractor or homeowner type work. LaBarbera told him that that was not the case, and he objected to a small producers contract because he believed that the 3 companies did a substantial amount of work on large construction sites. Accordingly, LaBarbera rejected De Maio's proposal for a small producers contract.

LaBarbera stated that if Mastronardi established that it performed homeowner work 100% of the time and it would not do "union work" covered by the Association contract, he would sign that contract. However, LaBarbera noted that Mastronardi never proved that it did only homeowner type work, or even that the bulk of its work was homeowner production. LaBarbera believed that the majority of the work done by Mastronardi was construction site work similar to that performed by members of the Association.

Thomas Gesualdi, the Union's vice president, testified that he attended the October 29 session. He recalled that De Maio

[5] Exceptions to the foregoing include: Nynex checks, which in January 1997, bore the 4 digit number presumably used by QRM, but a March 10, 1997, payment used a 5 digit number, and in April 1997, a 4 digit numbered check was used. Also, with respect to Con Edison, on December 20, 1996, a 5 digit numbered check was used, in early February 1997, a 4 digit numbered check was used, and on March 10, 1997, a 5 digit numbered check was used.

said that Mastronardi would only sign a contract if it contained a two-tier pay system: when the employee makes a delivery to a union contractor he would be paid union wages and benefits. When he delivered to small, nonunion type homeowner jobs, a different wage schedule would be applied. LaBarbera asked for a written proposal and said that he would review it, but De Maio had nothing in writing. He quoted De Maio as volunteering that it would be difficult to implement such a system because of the most favored nations clause. LaBarbera replied that it may be hard but he would look at De Maio's proposal and try to "work it out."

LaBarbera told De Maio that the union's contract was "industry-wide," and that a driver represented by the Union was capable of performing construction site work and "home owner" jobs. He added that to establish union and nonunion rates would "significantly undermine" the area standard set forth in the collective-bargaining agreement. LaBarbera stated that De Maio did not make a final offer that day.

LaBarbera stated that on October 29, De Maio did not make specific proposals concerning a small producers contract and never gave him anything specific so that he could entertain the proposals. LaBarbera stated that he told De Maio that he would entertain any proposals, but none were forthcoming. De Maio repeated that his client needed union and nonunion clauses in the contract, and further advised that Mastronardi was unable to pay the Association's contract wages. At that point, after only 15 minutes of discussion according to LaBarbera, De Maio said, "obviously we are at impasse." LaBarbera denied that the parties were at impasse, telling De Maio that he has not presented any proposals, adding that if he was saying that his client could not afford to give a wage increase due to economics, he would make a formal request to review its books and records. De Maio said he would speak to Gerardo Mastronardi, and that he would call LaBarbera.

LaBarbera testified that he did not believe that the parties were at impasse, and did not agree with De Maio that they were at impasse. LaBarbera explained that he did not believe that impasse had been reached because Mastronardi did not make any formal proposals; LaBarbera made a request for information, and told De Maio that he would entertain any written proposals. LaBarbera further testified that De Maio's proposal concerning separate union and nonunion wage rates was unacceptable because such an arrangement would significantly undermine the area standards, wages and benefits that union members fought hard over the past 40 years to obtain. He added that the Union does not have a union/nonunion wage clause in any contract in the industry because it has one wage rate set forth in its contracts, which covers drivers to whom the wage rate is the same whether he delivers materials to union or nonunion jobs.

LaBarbera did not contact De Maio after the October 29 meeting to request further bargaining because De Maio told him that he would speak to Gerardo or call LaBarbera. He did not hear further from De Maio.

The "most favored nations" clause in the Association agreement, which expired in June 1996, and the subsequent agreement, which ran from 1996 to 1996, stated essentially that if the Union granted to any Ready-Mix employer in New York City or Nassau County more favorable terms or conditions of employment than are contained in the Agreement, the employer shall have the right to have such more favorable terms or conditions incorporated in this agreement.

LaBarbera testified that if the Union agreed to a union/nonunion wage rate schedule for one employer it would have been required to apply that provision to all 450 employers under the Association contract. He stated that prior to July 1996, De Maio suggested that the Union not include a most favored nations clause in its contract with the Association.

LaBarbera stated that in the 1996 negotiations with the Association he did not attempt to avoid agreeing to the most favored nations clause or to seek to exclude it.

LaBarbera denied telling De Maio that he was only prepared to negotiate a contract on terms more restrictive to Mastronardi than the Association contract. He testified that during negotiations with Mastronardi he was prepared to consider a contract, which was more favorable to Mastronardi than the Association contract. LaBarbera candidly testified that he was opposed to De Maio's proposal for a small producer or homeowners contract because he did not believe that Mastronardi was a small producer, but LaBarbera was willing to negotiate. LaBarbera stated that he believed that since Mastronardi was doing the same work as other industry and Association employers, he was justified in seeking the same or similar terms as the Association contract. LaBarbera denies refusing to sign a contract with Mastronardi having more favorable terms than the Association contract.

LaBarbera testified that since the negotiations of 1996, the Union has not signed any contract with any employer on terms more favorable than the Association contract.

2. Respondents' Evidence

De Maio argued at hearing that because of the most favored nations clause, the Union was unable to grant a contract to Respondent on more favorable terms to any other employer and was "locked into" the Association contract. However, General Counsel argued that the Union was free to negotiate any terms it wished, but if it agreed to a more favorable term than the Association agreement, it would have to apply that term to the Association contract. General Counsel further argued that such a clause did not tie the Union's hands in negotiations, during which it could agree or not agree to any term offered by an employer.

De Maio testified that upon entering negotiations in 1996 he was concerned about the proliferation of nonunion companies. He stated that in March 1996, he met with LaBarbera in order to explore a different approach to a contract with the Union. He sought to have the Union adopt the concept that when a driver performed "union work" – delivery to a union contractor, he would be paid at the contractual, higher wage rate, and when he performed "non-union work" – delivery to a small contractor or homeowner, he would receive a different, lower rate of pay.

De Maio sought to convince LaBarbera that this approach would discourage the increase in nonunion companies, would permit smaller companies to sign a contract with the Union, and permit larger companies to enter the small producer market. He explained that larger companies find it unprofitable to deliver

concrete to small jobs so that under his concept the larger companies paying a lesser wage rate would seek the smaller jobs, thereby foreclosing nonunion companies from exploiting that market.

De Maio stated that initially, LaBarbera was "favorable" to the concept suggested by him, and was "willing to explore the possibility of a change in the format of the contract."

De Maio suggested that on jobs, which are "non-union" such as small, homeowner type work, the employees would not receive Union pension, welfare or annuity contributions. He noted that such benefits made it unprofitable for the small producer who delivered to small jobs, small contractors, and short loads of concrete. De Maio conceded that he presented no written proposals at that meeting. De Maio stated that he proposed to LaBarbera that all projects less than $5 million not be subject to pension, welfare, and annuity contributions and still be signatories to a Union contract. That would permit large producers to continue servicing large customers, but having the economic ability to service small customers.

De Maio stated that LaBarbera believed that the concept was sound, and during March and April they spoke about how the Union would enforce and police the concept. De Maio noted that LaBarbera presented the idea to the Union's on-site shop stewards who rejected it.

De Maio also suggested to LaBarbera in March 1996, that a specific starting time be eliminated, and that a straight 8-hour shift be instituted. LaBarbera was opposed to the change. De Maio also mentioned that he wanted to eliminate one or two holidays. LaBarbera agreed with that change but said that Union officials would not permit their removal.

De Maio conceded that these discussions in March, which occurred before the Association contract was concluded, were not negotiations but were discussions of a "concept." He noted that negotiations did not begin until about October 24.

In April and May, De Maio told LaBarbera not to include the most favored nations clause in the Union's contract with the Association. According to De Maio, LaBarbera said that he would attempt to exclude that clause from the agreement.

De Maio stated that in mid or late July 1996, he and LaBarbera had a negotiation session with a Union attorney in attendance. LaBarbera denies that negotiations took place then or at any time before October 29. They spoke about De Maio's concept of union and nonunion work, which LaBarbera rejected. According to De Maio, LaBarbera did not want to conclude any agreement until the Association contract was finalized. According to De Maio, they discussed wages and overtime pay. De Maio told LaBarbera that Mastronardi would agree to the Union's wage and holiday proposals, but could not agree to the Union's pension, welfare, and annuity provisions. Mastronardi also objected to the Union contract's alleged inflexibility with regard to starting time, mandatory lunch periods, and holidays.

Between the negotiation session in July and October 24, there were no other bargaining sessions. De Maio testified that on October 24, he met with LaBarbera and two other Union representatives. According to De Maio, he presented LaBarbera with Atlas' proposals for a new contract. That was the first time he presented Atlas' formal, written proposals. Mastronardi adopted those proposals.

The proposals, dated October 24, 1996, were received in evidence. They state that they represented a proposed contract with the Union to run from 1996 to 1999. They provided for a wage rate of $21.92 for the entire term of the contract; overtime pay to be paid at a rate of 1 ½ times the straight time hourly rate for more than 40 hours worked per week; 8 holidays; vacation pay; seniority; employees will retain their seniority and pay upon their return from military service; 3 sick days after 1 year of employment; employees may participate in a 401K pension plan and purchase health insurance from an HMO provider; paid life insurance; and bereavement leave.

De Maio stated that, at first, LaBarbera refused to review the proposals, saying that he was unwilling and unable to renegotiate any of the Association contract's terms because of the most favored nations clause, and because of the effect that the renegotiation of any of the terms would have upon the rest of the industry. LaBarbera further said that he could not negotiate a contract with Mastronardi that is better than the Association agreement, but that he was prepared to negotiate a contract that was worse than the Association's contract. De Maio further testified that LaBarbera did not read the proposals and instead said that the Association contract was an "impediment" to their negotiations. De Maio quoted him as saying that he could do nothing for him, we are "stuck" with the most favored nations clause, and he could not give De Maio a better contract. On that day, the only proposals discussed were the Atlas proposals.

LaBarbera conceded that he met with De Maio on October 24, but the purpose of the meeting was LaBarbera's deposition in a lawsuit brought by De Maio's client, Sandimo. LaBarbera denied that negotiations took place that day, and further denied that he received the Atlas proposals then, or at any time.

In this respect, I credit LaBarbera and find that no negotiations occurred on October 24. De Maio proposes that during the meeting in October, he presented the Atlas proposals, which were rejected because of the most favored nations clause, and then as a result proposed at the October 29 meeting the concept of a small producers contract with different rates payable depending upon whether the delivery went to large or small producers. However, it appears that such a discussion concerning small producers took place long before the October 29 meeting, such discussions beginning as early as the summer. Accordingly, I find that no October 24 negotiation session occurred.

De Maio stated that on October 29, he met with LaBarbera and his attorney at the Union office. He asked LaBarbera to consider a new contract and a new category of employer to permit the execution of a contract without violating the terms of the most favored nations clause. De Maio's aim was to avoid the application of that clause. Union attorney Earl Pfeffer said a concept of a "small producer company" or a "small company contract" may be possible—the effect of which would be to remove them from the coverage of the most favored nations clause.

De Maio proposed the institution of a small producer's contract to eliminate the issue of the most favored nations clause. He presented no other written proposals. He testified that when he presented the Atlas proposals at the October 24 meeting, LaBarbera could not grant them because the most favored nations clause in the Association contract would require that these

more favorable terms be applied to all the Association's employers. Accordingly, De Maio suggested a totally different contract—one that would place small employers in a different category—with a different contract—than the Association's contractors. According to De Maio, the Union's attorney said that such an idea may work.

De Maio noted that if an agreement were reached on the concept of a small producer's contract, the parties would then have discussed the terms for such a contract. However, the discussions did not progress that far.

De Maio denies declaring impasse at that meeting. Rather, he testified that at the end of the meeting, the Union attorney said he would contact him regarding the possibility of a small producer's contract.

By letter dated October 29, Union attorney Pfeffer stated that during the bargaining session that day, De Maio claimed that Mastronardi and the two other companies for which he was bargaining "indicated that [each] company was unable to afford the increases in wages and benefits demanded by Local 282." Pfeffer requested numerous financial documents from the three companies so that the Union could evaluate their claims of financial hardship and respond to their bargaining proposals.

Pfeffer testified that he did not attend the October 29 bargaining session. He stated that he sent the letter upon the request of LaBarbera who informed him that he had negotiated with Mastronardi that day and was told by De Maio that the company was unable to meet the Union's economic demands.

De Maio replied by letter of October 31, denying that Mastronardi made a claim of financial hardship. De Maio explained that it would be economically unfeasible to execute the Association contract, noting particularly that the pension, welfare, and annuity provisions were too expensive. The letter also noted that LaBarbera demanded that Mastronardi execute the Association contract, and was unwilling to negotiate that agreement any further. De Maio concluded that he believed that "there are economic issues here which are insurmountable and that we have, in fact, reached impasse even though neither side has yet declared it." De Maio asked for another bargaining session.

De Maio testified that in November and December he was again told by LaBarbera that Mastronardi must sign the Association contract and that he would not negotiate any terms of that contract on conditions more favorable to Mastronardi.

By letter to the Union dated November 15, De Maio stated that "we believe that the position of the Union with regard to the contract reached with the Association renders it impossible to reach an agreement with … Mastronardi and Atlas since, as small producers, they cannot compete effectively under the Association agreement. Under the circumstances, we believe that the parties are at impasse." The letter also advised that in the Spring, Mastronardi would hire permanent replacement employees on the terms of its last contract offer, and further noted that it has adopted the last contract offer of Atlas.

De Maio said that he did not receive a response to that letter and sent a letter dated December 15 in which he stated that LaBarbera advised him that due to the most favored nations clause in the Association agreement the Union was "unwilling and unable" to grant Mastronardi a contract which contains terms more favorable to the employer, and that a small producer's contract was not acceptable. The letter further stated that although LaBarbera advised that he would continue negotiations for a contract, which contained terms less favorable to Mastronardi than the Association contract, he had been advised that such a contract would be non-competitive even under the terms of the Association agreement, and therefore must have a contract, which contains terms more favorable to Mastronardi.

The letter concluded, "it is apparent that the parties are at impasse. You are unable to negotiate a contract which [Mastronardi] will execute and [it] is unable to execute the contract, which you have already agreed to with the Association. De Maio testified first that such a statement was a declaration of impasse. Then he testified that since he had not met with the Union from October 29 through December 15, he was only attempting to have the Union meet with him and the letter was not a "real" declaration of impasse.

De Maio stated that in or about February, March, or April, 1997, a copy of the last contract offer—the Atlas proposals which Mastronardi adopted—was posted on a bulletin board in Mastronardi's office, and he also informed the employees that that was the last contract offer which would be made by Mastronardi. As set forth above, letters dated April 29, 1997, were sent to employees Iadanza and McCabe advising Mastronardi that it was unable to reach agreement with the Union, and in the Fall of 1996, the parties reached impasse. The letter advised that employment with QRM was available.

McCabe testified that when he returned to Mastronardi's office in March 1997, he was not told that Mastronardi had made a final offer to the Union. Iadanza similarly testified that he was not told by anyone at Mastronardi in 1996 or 1997 that a final offer was made to the Union.

De Maio testified that Mastronardi implemented its last offer in or about April 1997.

G. The Recognition of Local 355

De Maio testified that in late 1997 or early 1998, QRM signed a collective-bargaining agreement with Local 355.

Fabriel Acevedo testified that in April 1997 he became an employee of QRM in April 1997 where he drives and maintains the trucks. He earns about $180 per day and is paid by the day, not by the hour. He did not receive medical benefits or pension when he became employed by QRM. In late 1997, employees consisted of himself, John Agostino, Antonio Mastronardi and Daniel Mastronardi.

Acevedo reported to Antonio and Daniel Mastronardi, and he received his assignments from Antonio who told him which days to work and whether to report to work.

About 4 or 5 months after Acevedo's hire, he and the other employees spoke about the necessity for medical benefits. They all agreed that they needed such coverage. He raised the subject first with Antonio Mastronardi. Antonio agreed and said he would see what he could do. Later, Antonio said that he could obtain medical insurance. Acevedo did not call Local 355.

Acevedo said that there was an "election" by the workers for Local 355, which consisted of the drivers speaking about medical benefits and agreeing to join Local 355. Acevedo was asked to sign a card for that union. The workers received medical

benefits, pension and an annuity fund. Acevedo had been a member of Local 282 for 10 years. While employed at QRM he was never asked by anyone whether he supported Local 282.

John Agostino began work for QRM in April 1997 as a driver. He was also paid by the day, and did not receive medical benefits or pension when he began work. He stated that in late summer, 1997, Acevedo first mentioned that he needed medical benefits, and all the employees expressed an interest in obtaining that benefit. After group discussions among the employees and Antonio and Gerardo Mastronardi, Antonio contacted Local 355 and later explained what benefits were available from that union. Agostino denied speaking with anyone from Local 355, and stated that there is no shop steward at QRM. Agostino was not asked by Antonio Mastronardi about Local 282.

Antonio Mastronardi testified that employees first raised the issue with him that they needed medical insurance coverage. He told them that he had been a member of Local 355 since 1996, and asked if they wanted to join that union. The employees spoke to Antonio and they agreed to join. He had them sign cards for Local 355, and he also gave them forms to complete for medical benefits. They returned the forms to Antonio and he sent them to Local 355.

Antonio testified that in about the summer of 1997, QRM and Local 355 agreed that that union could represent the employees of QRM, and that the parties would begin to negotiate a contract. He stated that in about October 1997, QRM signed a collective-bargaining agreement with Local 355. The contract between QRM and Local 355 was not submitted in evidence. However, it is undisputed that contributions have been made to the Local 355 funds in behalf of the employees of QRM.

ANALYSIS AND DISCUSSION

III. THE STATUS OF QUEENS READY-MIX

The complaint alleges that QRM is the alter ego of and successor to Mastronardi, and that they are a single employer.

A. Alter Ego

In determining whether a business is an alter ego of another company, the Board examines whether the entities share "substantially identical management, business purpose, operation, equipment, customers, and supervision, as well ownership." *Crawford Door Sales Co*., 226 NLRB 1144 (1976). The Board does not require the presence of each factor to conclude that alter ego status should be applied. *Fugazy Continental Corp*., 265 NLRB 1301, 1301-1302 (1982). The Board also considers, but does not require a finding of intent to evade labor obligations in order to make an alter ego determination.

Regarding management of the companies, the evidence establishes that Gerardo Mastronardi was a working boss who directed employees of both Mastronardi and QRM. Although employees of QRM also take orders from Antonio Mastronardi, Gerardo continues to actively supervise the workers. Accordingly, management remains substantially identical.

The business purpose and operation of both Mastronardi and QRM are substantially identical. The same type of work was done by both—the delivery of concrete to construction sites. Both companies operated from the same location using the same equipment. The trucks that had been used by Mastronardi were utilized by QRM. The fact that the trucks were painted a different color and had QRM's name displayed does not change the equipment itself. The operation and inventory of the store in which mason supplies were sold remained the same. There was no hiatus in the close of Mastronardi and the opening of QRM. Mastronardi's checking account system was utilized to pay bills for QRM, Mastronardi's telephone number remained the same when QRM took over, and deliveries made by QRM were recorded on Mastronardi invoices. *Advance Electric*, 268 NLRB 1001, 1002 (1984).

The evidence, set forth in detail above, establishes that Mastronardi and QRM shared the same customers and suppliers.

Regarding unlawful motivation, here Mastronardi expressed an interest in going "non-union". *AAA Fire Sprinkler, Inc*., 322 NLRB 69, 72 (1996). In that case the purpose in creating an alter ego company was to "reduce … labor costs by skirting his collective-bargaining agreement with the union." Similarly, in *Cofab, Inc*., 322 NLRB 162, 164 (1996), the Board noted that the employer told its employees that it could no longer afford the Union, that the Union was going to force it to close, and that the owner intended to put the business in her son's name. Like this case, in *Advance Electric*, supra, the employer told its employees that it would close its doors and was "going nonunion, opening another shop." That employer also told its employees that it was not making any money and that "the only way he could curb the situation was either to go out of business entirely or close down and open up non-union."

Similar statements were made here. I credit the uncontradicted testimony of McCabe that in July 1996, following the expiration of the Association contract, he was told by Gerardo and Vincente Mastronardi that they would not "re-sign" a contract with the Union and that they were going to go "nonunion" because the Union contract was too expensive and they could not "compete in the marketplace." I find that one month later, Iadanza was told by Vincente that although Mastronardi's attorney was negotiating a contract, he (Vincente) did not want the Union to be involved with the company. Thereafter, in November, Gerardo told McCabe that Mastronardi would not sign a contract with the Union and would go nonunion.

It is significant that certain of these statements by Mastronardi officials were made even prior to any negotiations between the company and the Union. They clearly indicate that the closing of Mastronardi and the creation of QRM were motivated by a desire to evade the company's bargaining responsibility under the Act.

With respect to ownership, the Board has held that "where members of the same family are the owners of two nominally distinct entities which are otherwise substantially the same, ownership and control of both of the entities is considered substantially identical." *Cofab*, supra at 163. Here, ownership of the two companies was held by the Mastronardi family. Gerardo and Vincenzo, who are brothers, owned Mastronardi. Thereafter, Gerardo became the sole owner of QRM. Gerardo's son Antonio became the president of QRM while Gerardo became secretary and treasurer. Accordingly, inasmuch as members of the same family are the owners of the 2 companies, I

find that ownership and control of Mastronardi and QRM is substantially identical.

I accordingly find and conclude that QRM is the alter ego of Mastronardi Mason Materials. As an alter ego, QRM was not privileged to withdraw recognition from, or to repudiate its obligations under the collective-bargaining agreement with the Union. QRM is thus bound by the terms of the Association's expired collective-bargaining agreement with the Union to which Mastronardi assented. *Cofab, Inc.*, supra at 164.

B. Successor

In determining whether a new employer is the successor to the prior employing entity, the Board utilizes a factual approach based upon the totality of the circumstances of each case. The question is whether there is "substantial continuity" between the enterprises. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The criteria relevant to such a determination is:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

The evidence is clear that QRM is a successor to Mastronardi. The evidence set forth above with respect to QRM's alter ego status is the same as that used in the determination of its successor status. QRM began its operations with no hiatus from Mastronardi's close. QRM maintains the same operations at the same location doing the same work – delivery of concrete to the same customers and purchase of supplies from the same suppliers. Its owners and supervisors remain essentially the same. The same equipment is used to deliver its products.

An important factor in this determination is whether a majority of the new employer's employees had been employed by the predecessor. Here, of course, Iadanza and McCabe did not become employed by QRM. General Counsel argues that they were discriminatorily refused hire by QRM. The Board has held that a refusal to hire employees in order to avoid paying higher union wages and benefits paid by a predecessor employer is a violation. "Refusing to hire employees in order to avoid their union wage scale is the plainest form of 8(a)(3) discrimination and is in no way lawfully distinguishable from a refusal to hire employees in order to avoid a successorship obligation. Collectively, such conduct constitutes discrimination against employees' union affiliation." *Sierra Realty Corp.*, 317 NLRB 832, 833 (1995).

As set forth above, Iadanza and McCabe were told several times by the Mastronardis that they could only work at QRM if they were willing to do so on a nonunion basis. When they refused to do so, they were denied employment with QRM.

Under these circumstances, it is clear that but for QRM's unlawful motive in refusing to employ Iadanza and McCabe it would have hired all the predecessor's unit employees. Under ordinary circumstances, a successor is free to set initial terms on which it will hire the predecessor's employees. *Burns*, 406 U.S. at 294-295. "However, this right is forfeited where, as here, the successor has unlawfully failed to hire employees because of their union affiliation." *Sierra Realty Corp.*, supra at 836.

C. The Alleged Pre-Hire Contract

Respondents assert that the Association agreement was a pre-hire construction industry agreement pursuant to Section 8(f) of the Act, which permitted the employer to refuse to recognize the Union following its expiration. Respondents also assert that they are in the building and construction industry within the meaning of Section 8(f).

The Board has held that ready-mix concrete delivery companies are not engaged in the building and construction industry within the meaning of Section 8(f). *J.P. Sturrus Corp.*, 288 NLRB 668, 671 (1988).

McCabe testified about his work duties. He drove a cement truck making deliveries to jobsites. At the site he unloads the cement at locations designated by the customer, and then returns to the yard for another load. He stated that none of the drivers did finishing work, which apparently consists of leveling the cement in the forms. On occasion, after dropping the load, if he desired, he would help the customer by holding the chute and dispensing cement into a wheelbarrow, and on occasion push the wheelbarrow to where the cement was needed. He did not work with a shovel or leveling beam. He was not required by Mastronardi to help customers or do finishing work. He also stated that the other drivers performed the same type of work as he.

The fact that McCabe and perhaps other drivers "occasionally, and at their own discretion, assist the contractor at the construction site with screening and spreading of concrete, after they have poured it" where they were not required or asked to perform those functions by the employer or contractor does not bring Respondents within the construction industry. *Sturrus*, supra, at 668.

In addition, the expired contract does not contain clauses that are characteristic of prehire agreements in the construction industry. The union security clause provides for a 30-day period within which the employee must join the union, and not 7 days as permitted by Section 8(f). *St. John Trucking*, 303 NLRB 723, 730 (1991).

I accordingly find that the Union is a Section 9 bargaining representative.

D. The Impasse and Unilateral Changes

The complaint alleges that Mastronardi prematurely declared impasse in negotiations with the Union, QRM unilaterally changed terms and conditions of employment set forth in the expired collective-bargaining agreement without a valid impasse having been reached, and even if an impasse had been reached the changes made were inconsistent with the final offer made at the time of impasse.

A genuine impasse in negotiations exists when the parties are warranted in assuming that further bargaining would be futile or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Bryant & Stratton Business Institute*, 327 NLRB No. 174, slip op at 14

(1999). "A genuine impasse in negotiations is synonymous with deadlock. Where there is a genuine impasse the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *CJC Holdings*, 320 NLRB 1041, 1044 (1996). A lawful impasse may occur where the parties have discussed the issues separating them fully and, notwithstanding their best efforts to reach agreement, are unwilling to move from their positions." *Taft Broadcasting Co.*, 163 NLRB 475 (1967). The burden of proving that an impasse exists is on the party asserting the impasse. *Outboard Marine Corp*., 307 NLRB 1333, 1363 (1992).

The negotiations, which took place here, were abbreviated. In July 1996, LaBarbera gave De Maio a copy of the Union's proposals to the Association. There was some general, informal discussion during the spring and summer months concerning De Maio's concept for a different type of contract for Mastronardi and other companies he represented. However, no formal proposals were made at that time. The parties agreed to wait until after the Association contract had been completed.

Both parties agree that a bargaining session occurred on October 29. I cannot credit De Maio's testimony that a negotiation session occurred on October 24. As set forth above, LaBarbera denied that any bargaining occurred on October 24, and they agree that on that date LaBarbera was deposed for a lawsuit. On October 29, De Maio's position was that the Association contract, particularly the pension, welfare, and annuity provisions were too expensive. They discussed De Maio's concept concerning the payment of nonunion benefits for jobs performed for homeowner and small contractor accounts. LaBarbera gave De Maio a copy of the Association agreement and said that the Union sought those terms, and also gave him a copy of proposals the Union had made, which were not accepted or which the Association and Union agreed not to include in the new contract.

Although LaBarbera's demand included the Association contract or more favorable terms to the Union, that was his first position. De Maio's first position was that the Association's benefit package was too expensive, although Mastronardi would have agreed to the wage provision in that contract. However, LaBarbera testified that he would consider a contract, which was more favorable to Mastronardi than the Association contract, but believed that since Mastronardi did the same type of work as Association contractors he was justified in seeking the same or similar terms as the Association contract. LaBarbera rejected De Maio's proposal for a small producers contract because he did not believe that Mastronardi's work primarily consisted of small jobs.

Although De Maio testified that the Union's reaction was initially receptive to his proposal, LaBarbera said that a 2-tier rate would undermine the area standard established in the Association contract.

LaBarbera testified that he never was presented with the Atlas proposals. He and Gesualdi who were present at the October 29 session, denied receiving them then or at any time. However, there is some evidence that they were presented. Thus, Union attorney Pfeffer's letter of October 29 stated that the Union sought financial information in order to "respond to [Mastronardi's] bargaining proposals." Those proposals, which apparently were the Atlas proposals, contain economic proposals.

Even assuming that the Atlas proposals were presented to LaBarbera, the evidence establishes that only one, and perhaps two meetings were held between the parties. The Atlas proposals, according to De Maio, were rejected by LaBarbera on the ground that the most favored nations clause in the Association contract prevented their adoption. Following that position, De Maio presented the 2-tier concept.

I cannot find that a valid impasse occurred. First, as set forth above, as early as July 1996, the Mastronardis told Iadanza and McCabe that the company intended to go "non-union", the contract was too expensive, and they would not sign a contract with the Union. McCabe was told that Mastronardi would not sign another agreement with the Union. Iadanza was told that the company did not want to be involved with the Union.

Those statements illustrate that bargaining, whatever brief negotiations occurred, were not undertaken with the good faith desire to reach agreement required by Section 8(d) of the Act. Rather, I find that even before negotiations began in October, Respondents did not intend to reach agreement.

At the October 29 session, which both parties agreed occurred, there was little substantive discussion about the terms of a new agreement. The Union presented the Association contract as its proposal and De Maio claimed that it was not affordable. In response, as set forth in the letter immediately sent by the Union, it asked for Mastronardi's financial records to support its claim of inability to pay.

Although De Maio's letter of October 31 denies that Mastronardi made a claim of financial hardship, he nevertheless wrote that it would be economically unfeasible to execute the Association contract, noting particularly that the pension, welfare, and annuity provisions were too expensive. Accordingly, it is clear that De Maio was indeed making a claim of inability to pay, and De Maio offered to provide some of the requested information.

Nevertheless, in that letter, De Maio asked that another bargaining session be held. Clearly, De Maio believed that a further negotiation meeting could lead the parties toward agreement. It is significant that another session was never held.

Respondents never provided the requested information with which the Union may have been induced to lower its demands. I am aware that there is some evidence that LaBarbera insisted that Mastronardi sign the Association contract, however this was a first bargaining position of the Union, which may have been altered by further bargaining, especially if it had been provided with the requested financial information.

Although De Maio may have presented the Atlas proposals at that meeting, the fact that no further bargaining took place after the October 29 meeting establishes that the parties have not made their best efforts to reach agreement. It cannot be said that the parties "have discussed the issues separating them fully." *Taft*, supra, or have made their "best efforts to achieve agreement." *CJC*, supra.

I cannot find that impasse occurred after the sole bargaining meeting of October 29. The parties simply did not have an op-

portunity to explore their differences and engage in good faith bargaining with a serious intent to reach agreement.

Further, De Maio's testimony concerning his letter of December 15 in which he declared that impasse had occurred contradicted the declaration of impasse. He testified that since he had not met with the Union from October 29 through December 15, he was only attempting to have the Union meet with him and that the letter was not a "real" declaration of impasse. This demonstrates that De Maio did not actually believe that impasse had occurred and still sought a bargaining session so that the parties could adjust their differences.

Respondents cite *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1365, 1371 (1981). In that case, the Board found that the employer had not violated the Act by engaging in surface bargaining or by unilaterally implementing certain terms of employment. It held that an impasse existed since the union, because of a most favored nations clause in its association contract could not offer lower terms than set forth in that contract, and the employer was financially unable to accept the terms of the association agreement. The judge, affirmed by the Board stated: "I believe that those constraints rather than any bad faith by the employer prevented the parties from reaching agreement."

Lunsford is distinguishable. In that case, five bargaining sessions had taken place with proposals and counterproposals being made. The Board also found an absence of bad faith by the employer in bargaining. Here, only one bargaining session was held with little substantive discussion. In addition, Respondents' bad faith is evident in its announcement to employees Iadanza and McCabe even before negotiations began, that it intended to go "non-union" and would not sign a contract with the Union.

I accordingly find that no impasse had been reached in negotiations. Inasmuch as I find that QRM prematurely declared impasse, it was not entitled to unilaterally change terms and conditions of employment. *Beverly Farm Foundation*, 323 NLRB 787, 793 (1997).

The evidence establishes that QRM has made changes in the terms and conditions of its employees' employment. Such changes consist of the failure to make pension, welfare, and annuity contributions to the funds of the Union, and the payment of wages by the day and not by the hour.

I further conclude that such changes are unilateral changes in the terms and conditions of employment of its employees by departing from established terms and conditions of employment of the Mastronardi employees as reflected in the expired collective-bargaining agreement between Mastronardi and the Union. *Weco Cleaning Specialists*, 308 NLRB 310, 320 (1992).

E. The Alleged Interference with Employee Rights and Discrimination Against Employees

The complaint alleges that Mastronardi threatened employees with layoff, QRM conditioned the re-employment of its employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of QRM's last offer to the Union, and QRM refused to rehire from its seasonal layoff Iadanza and McCabe.

As set forth above, Iadanza and McCabe were told more than once that the company would be going "non-union" and if they wanted to continue to work they could do so on nonunion terms. Antonio Mastronardi asked Iadanza to consider leaving without problems and offered to find him a job with a Union company. When they reported to work following the winter offseason, both employees were told that they could work, but only if they agreed to do so without the Union. When they refused, they were denied work.

I have rejected QRM's defense that it was entitled to hire replacement employees because an impasse in negotiations occurred, and the two employees were therefore offered reemployment upon the terms of the last contract offer to the Union.

I find that the statements to Iadanza and McCabe constituted unlawful threats that they would be laid off if they did not abandon the Union. Mastronardi knew of the employees' Union affiliation and because of the company's announced intention to operate a nonunion facility it refused to reemploy them. Those statements violated Section 8(a)(1) of the Act.

General Counsel has proven that the refusal to rehire Iadanza and McCabe at the beginning of the March 1997 season was motivated by their Union membership. *Wright Line*, 251 NLRB 1083 (1980). QRM did not want any affiliation with the Union and refused to rehire the two employees because they refused to renounce their Union affiliation and work on a nonunion basis.

QRM has not established that it would have refused to rehire them even in the absence of their Union affiliation. Its defense that an impasse in bargaining occurred and that it could lawfully implement its last offer to the Union is not a defense to its withdrawal of recognition from the Union or its refusal to rehire employees because they are members of the Union.

I accordingly find and conclude that the refusal to rehire Iadanza and McCabe violated Section 8(a)(3) and (1) of the Act. See *Sierra Realty*, supra.

F. The Alleged Violations of Section 8(a)(2)

The complaint alleges that in late 1997 or 1998, Mastronardi and/or QRM unlawfully recognized Local 355 and unlawfully executed a collective-bargaining agreement with it, which provides for the deduction of dues and other fees.

QRM employees inquired about obtaining medical benefits and thereafter Antonio Mastronardi, its president, contacted Local 355. In about October 1997, QRM signed a collective-bargaining agreement with Local 355. General Counsel argues that such conduct violated the Act.

QRM argues that it permissibly withdrew recognition from the Union and recognized Local 355 because it had a good faith doubt that the Union represented a majority of its employees. The 2 current employees of QRM who testified stated that they were not asked about their interest in Local 282 by employer representatives. Their only interest was obtaining medical benefits and Antonio Mastronardi then contacted Local 355. Thus, there was no evidence that employees no longer wished to be represented by the Union. Similarly, there was no evidence presented by the employer that it was aware that employees no longer wished the Union to represent them. Accordingly, QRM could have no good faith doubt that Local 282 represented its employees. *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1073 (1989).

Moreover, even if such doubt existed, it "can arise only in a context free of the coercive effect of unfair labor practices of such a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *A.M.F. Bowling Co.*, 314 NLRB 969, 979 (1994). Here, the only employees who supported Local 282, Iadanza and McCabe, were refused employment because of such support. I have found that the refusal to rehire them violated the Act.

In *Citywide Service Corp.*, 317 NLRB 861 (1995), the Board held that an alter ego's recognition of a different union than the one which had represented the prior company violated Section 8(a)(2) of the Act. The Board reasoned that no other union could lawfully represent the employees of the alter ego regardless of whether the assisted union had obtained authorization cards from a majority of unit employees at the time of recognition.

Inasmuch as I have found that QRM is the alter ego of Mastronardi, I find that QRM violated Section 8(a)(2) of the Act by recognizing Local 355 and executing a collective-bargaining agreement with it.

CONCLUSIONS OF LAW

1. Respondents Mastronardi Mason Materials Co., and Queens Ready-Mix, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 282, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with layoff if they did not abandon their membership in Local 282, Mastronardi Mason Materials Co., violated Section 8(a)(1) of the Act.

4. By conditioning the re-employment of its employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of Queens Ready-Mix's last offer to the Union, and by refusing to rehire from its seasonal layoff employees Ronald Iadanza and Daniel McCabe, Queens Ready-Mix, Inc. violated Section 8(a)(3) and (1) of the Act.

5. At all material times, the Union has been the designated exclusive collective-bargaining representative of the employees of Queens Ready-Mix, Inc., and its predecessor Mastronardi Mason Materials Co. in the following appropriate bargaining unit within the meaning of Section 9(b) of the Act:

> All employees classified as chauffeurs employed by members of the Association of New York City Producers, Inc., hereinafter called the Association, and of the employers who have authorized the Association to bargain on their behalf, including Respondent Mastronardi.

6. By prematurely declaring impasse in negotiations with the Union, Mastronardi Mason Materials Co. violated Section 8(a)(5) and (1) of the Act.

7. By failing to continue in effect all the terms and conditions of the collective-bargaining agreement between the Association and Local 282 which expired in June 1996, Respondents have violated Section 8(a)(5) and (1) of the Act.

8. By unilaterally changing terms and conditions of employment set forth in the expired collective-bargaining agreement between the Association and Mastronardi without a valid impasse having been reached, Queens Ready-Mix, Inc., violated Section 8(a)(5) and (1) of the Act.

9. By recognizing Local 355, Service Employees International Union and executing a collective-bargaining agreement with it, which provides for the deduction of dues and other fees at a time when they were obligated to recognize and bargain with Local 282, Respondents violated Section 8(a)(2) and (1) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents unlawfully withdrew recognition from the Union, I shall recommend that Respondent Queens Ready-Mix, Inc. recognize and, on request, bargain with the Union in good faith as the exclusive representative of the employees in the appropriate bargaining unit, immediately reinstate employees Ronald Iadanza and Daniel McCabe, and make them whole for any loss of earnings and other benefits they may have suffered as a result of Respondents' failure to rehire them for work at Queens Ready-Mix, Inc., less any interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondents failed to continue in effect all the terms and conditions of the Association's collective-bargaining agreement with the Union which expired in June 1996, I shall recommend that Respondents make required benefit fund payments from the date of its unlawful action, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, I shall recommend that Respondent Queens Ready-Mix, Inc., abide by the terms and conditions of the collective-bargaining agreement between the Association and the Union which expired in June 1996, and shall, on request, reinstate the terms and conditions of employment set forth in that agreement, and shall make whole its employees, including Ronald Iadanza and Daniel McCabe for any losses they have suffered because of Respondents' failure to adhere to such terms and conditions of the collective-bargaining agreement, as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest to be computed in the manner set forth in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

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6 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent Mastronardi Mason Materials Co., and its successor and alter ego Queens Ready-Mix, Inc., Jamaica, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with layoff if they did not abandon their membership in Local 282.

(b) Conditioning the re-employment of its employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of Queens Ready-Mix's last offer to the Union.

(c) Refusing to rehire from its seasonal layoff employees Ronald Iadanza and Daniel McCabe because of their membership in Local 282.

(d) Withdrawing recognition from Local 282 and refusing to bargain with it by prematurely declaring impasse in negotiations with the Union, and by failing to continue in effect all the terms and conditions of the collective-bargaining agreement between Mastronardi Mason Materials Co. and Local 282, which expired in June 1996, and by unilaterally changing terms and conditions of employment set forth in the expired collective-bargaining agreement between the Association and Mastronardi without a valid impasse having been reached.

(e) Recognizing Local 355, Service Employees International Union and executing a collective-bargaining agreement with it which provides for the deduction of dues and other fees at a time when Queens Ready-Mix, Inc. was obligated to recognize and bargain with Local 282.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, bargain with Local 282 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees classified as chauffeurs employed by members of the Association of New York City Producers, Inc., hereinafter called the Association, and of the employers who have authorized the Association to bargain on their behalf, including Respondent Mastronardi.

(b) Reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement between the Union and Mastronardi Mason Materials Co., which expired in June 1996.

(c) Make the contractually required payments to the benefit funds that were not made, make whole the unit employees, including Ronald Iadanza and Daniel McCabe for any losses they may have suffered as a result of the failure to make such payments, and for any losses they may have suffered as a result of the failure to adhere to the terms and conditions of employment in the collective-bargaining agreement between the Association and Mastronardi, which expired in June 1996, as set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, offer Ronald Iadanza and Daniel McCabe full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Ronald Iadanza and Daniel McCabe whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to rehire, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to rehire will not be used against them in any way.

(g) Withdraw and withhold recognition from Local 355, SEIU, AFL–CIO, as the representative of its employees unless Local 355 has been certified by the Board as their exclusive collective-bargaining representative.

(h) Reimburse past and present employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed between Queens Ready-Mix, Inc., and Local 355.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 24, 1997.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 17, 1999

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[7] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with layoff if they do not abandon their membership in Local 282.

WE WILL NOT condition the re-employment of our employees upon their withdrawal of their Union membership and acceptance of the terms and conditions of Queens Ready-Mix's last offer to the Union.

WE WILL NOT refuse to rehire from its seasonal layoff our employees Daniel McCabe and Ronald Iadanza because of their membership in Local 282.

WE WILL NOT withdraw recognition from Local 282 and refuse to bargain with it by prematurely declaring impasse in negotiations with the Union, by failing to continue in effect all the terms and conditions of the collective-bargaining agreement between the Mastronardi Mason Materials Co. and Local 282 which expired in June 1996, or by unilaterally changing terms and conditions of employment set forth in the expired collective-bargaining agreement between the Mastronardi Mason Materials Co. and the Union without a valid impasse having been reached.

WE WILL NOT recognize Local 355, Service Employees International Union or execute a collective-bargaining agreement with it which provides for the deduction of dues and other fees at a time when Queens Ready-Mix, Inc. was obligated to recognize and bargain with Local 282.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and on request, bargain with Local 282 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees classified as chauffeurs employed by members of the Association of New York City Producers, Inc., hereinafter called the Association, and of the employers who have authorized the Association to bargain on their behalf, including Respondent Mastronardi.

WE WILL reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement between Mastronardi Mason Materials Co. and the Union, which expired in June 1996.

WE WILL make the contractually required payments to the benefit funds that were not made, make whole the unit employees, including Ronald Iadanza and Daniel McCabe for any losses they may have suffered as a result of the failure to make such payments, and for any losses they may have suffered as a result of the failure to adhere to the terms and conditions of employment in the collective-bargaining agreement between the Mastronardi Mason Materials Co. and the Union which expired in June 1996.

WE WILL within 14 days from the date of this Order, offer Ronald Iadanza and Daniel McCabe full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Iadanza and Daniel McCabe whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful refusals to rehire, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to rehire will not be used against them in any way.

WE WILL withdraw and withhold recognition from Local 355, SEIU, AFL–CIO, as the representative of our employees unless Local 355 has been certified by the Board as their exclusive collective-bargaining representative.

WE WILL reimburse past and present employees, with interest, for all dues and fees withheld from their pay pursuant to the collective-bargaining agreement executed between Queens Ready-Mix, Inc., and Local 355.

MASTRONARDI MASON MATERIALS